GUIDELINES FOR PARTIES AND COUNSEL ON PRETRIAL AND TRIAL MATTERS REVISED JUNE 2003

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Please take a few minutes to review these guidelines and the latest edition of our court's Rules of Practice and Procedure. They answer most questions about practice in this court.

I have been reluctant to adopt rules and guidelines for several reasons. First, most of this is nearly instinctive (thorough preparation, timeliness, courtesy, and fairness). Second, you have plenty of things to concern you without more rules. Third, setting rules invites exceptions and compliance issues. However, lawyers regularly ask about practice here, and these guidelines are an effort to answer those questions, while promoting reasonable flexibility and efficiency in preparing and trying cases.

I welcome thoughtful criticism and suggestions regarding any of these practices and our district's rules, particularly in light of our recent efforts to standardize many of our procedures, and anticipate your candid evaluation once you have worked with them.

I. SCHEDULING

With few exceptions, other than in very rare instances, scheduling will be done with the United States Magistrate Judges. **As you do this scheduling, everything works off the trial date which will not be moved in the absence of a significant crisis.** Treat your trial date as inviolate. Schedule around it the same way you would your vacation.

We treat the deadlines as firm dates, and each date is important relative to the others. Every extension of time reduces the time to accomplish other pretrial tasks. This is particularly true of dispositive motions. I will work with you within limits but view skeptically repeated claims of the "press of business" to justify changing a schedule counsel largely formulated in the first instance.

II. PRETRIAL

1. Expert Opinions. Review Rule 26(a)(2) of the Federal Rules of Civil Procedure carefully. I require all Rule 26(a)(2) disclosures to be made unless all parties have signed a written waiver of disclosure. The waiver must identify specifically which portions of the disclosures are being waived, and you must provide a copy of the waiver to me for approval, immediately upon signing by all parties. In the absence of strict compliance with the court's waiver requirement (including my approval) or strict compliance with Rule 26(a)(2), the witness's testimony will be excluded pursuant to Rule 26(e)(1).

2. Doctors as Experts. In my view, a treating physician is not an expert witness for purposes of Rule 26 if the doctor's testimony is limited to her or his treatment of the patient. That is, the doctor

may testify to her or his contact with the patient and matters which fall within the realm of a diagnosis, treatment, anticipated future course of treatment, and prognosis without having to make Rule 26 expert disclosures. However, once the doctor moves into other issues, *e.g*, standard of care, evaluation of a person's condition obtained outside of a treatment context, other opinion testimony, all Rule 26(a)(2) disclosures must be made. Factors which may not be determinative, but which I will look at carefully, are whether the patient saw the doctor before being advised to do so by a lawyer, and how the referral came about.

3. Depositions. Review F.R.Civ.P. 28-30 carefully. Depositions are not contests to see how much information a witness and her or his lawyer can avoid disclosing.

4. Pretrial Conference and Order. Review D. Kan. Rule 16.2 carefully. Discovery should be completed and your case ready for trial at the time of the pretrial conference. If you are able to agree on a pretrial order, you may submit it to the court on or before the time scheduled for the pretrial conference. The court has a standardized form available on our public web site at www.ksd.uscourts.gov/features/forms.

5. Settlement Conference. Review D. Kan. Rule 16.3 carefully. In conformity with our court's alternative dispute resolution plan, I require a mediation in every case unless I am convinced it would be futile. It will take a very strong showing to convince me of such futility. The conference generally will be scheduled between disposition of summary judgment motions and trial, although I may schedule a conference at an earlier time, or direct a second conference in an appropriate circumstance. With rare exception, lead counsel and the client must appear personally for the settlement conference. An insurance company or other business must have a representative personally present who has complete authority to settle the case without having to check with anyone else. It is also a good idea to check with the proposed mediator to be certain there are no possible conflicts of interest.

6. Final Witness and Exhibit Lists. Final witness and exhibit lists are to be limited to those witnesses you intend to call and exhibits you intend to use at trial. They are not to be comprehensive recitations of all persons who have knowledge of some aspect of the case and all documents and other items in your possession or which were produced in discovery. If a previously disclosed witness or document is not included in the final witness and exhibit list, but something else occurs in the trial requiring that witness's testimony or that document's use, I will not penalize you for trying in good faith to accurately state which witnesses and exhibits you will use.

7. Deposition Testimony. Any party wishing to offer testimony by deposition, whether by reading transcript or by videotape, should designate those portions of all depositions it wishes to use at least fourteen days prior to the *in limine* conference. The designations and objections should be made by reference to page and line in the transcript. If any opposing party plans to offer additional portions of the deposition or object to any part offered, that party must designate the testimony and make objections at least five days before the *in limine* conference. All objections to the additional

designation must be filed at least three days before the *in limine* conference so I have time to review the designated testimony and objections.

If the parties plan to use videotaped depositions, the party offering the deposition will have the obligation to edit the tape in accordance with the designations and court's rulings so it can be played for the jury in an uninterrupted manner.

8. *In Limine* Conference. An *in limine* conference typically is scheduled the week before trial begins. A checklist of matters to be addressed is attached, and the lawyers will be asked to complete the form before I meet with them for the conference. In addition to matters set out previously, the parties should have completed the tasks set out below before the *in limine* conference:

A. Exhibits. The parties should have prepared an exhibit list, provided the list to all other parties, reviewed the other exhibit lists and noted objections to exhibits, stipulated to the admissibility of all exhibits not being contested, and eliminated duplicate exhibits (*e.g.*, duplicate medical records, photographs, diagrams, etc.). As many exhibits as possible will be pre-admitted into evidence at the *in limine* conference. The parties should also have shown all exhibits they plan to use during opening statements to all other parties sufficiently ahead of the *in limine* conference that objections can be filed at least three days before the conference. Our court has a standardized exhibit list format available on the court's public web site at www.ksd.uscourts.gov/features/forms.

B. Numbering of Exhibits. In a perfect world, the parties will put together one exhibit list and each exhibit will have a sticker which reads "Exhibit ____" with the number filled in. Until the parties reach that point, the parties will use their respective plaintiff and defendant stickers (or, if joint exhibits, either plain or joint exhibit stickers), and both will use numbers. During trial, counsel will refer to the exhibit as labeled. **No one is to use letters.**

C. Schedule of Witnesses. The parties should have a schedule of witnesses prepared and exchanged prior to the *in limine* conference so that scheduling can be discussed on something more than an ethereal basis at the conference.

D. *In Limine* Motions and Instructions. File all *in limine* motions and requested instructions **(elements, contentions and other special instructions only – we have all of the boilerplate pattern instructions here already)** at least one week prior to the *in limine* conference. Instructions should be submitted on a 3.5"disk in WordPerfect format or be filed by email through CM/ECF.

E. Instructions to the jury at the beginning of trial. The court will give elements instructions and other standard instructions to the jury immediately before the first

witness takes the stand. The court will make an effort to get a draft of those instructions to counsel at least three days before the *in limine* conference, so counsel should be prepared to make any objections to those instructions at the conference.

9. Assist the Court and the Court Reporter. If you will be using technical, medical, or unusual terms in your case, please provide a glossary of those terms to the court and the court reporter at the *in limine* conference.

III. TRIAL

1. Standard trial schedule. Unless I advise you otherwise, court will start at 9:00 a.m. on the first day, ending at approximately 4:30 p.m. Each subsequent day, trial begins at 8:00 a.m. and ends at 1:30 p.m., with two 15-20 minute recesses interspersed, again, unless I tell you otherwise. The jury and I will be in the courtroom at starting time.

2. Addressing the court. Stand when making an objection or addressing the court.

3. Addressing the witnesses. A witness should be addressed by an appropriate "Mrs.", "Ms.", "Miss", "Mr.", or "Dr.", and not by her or his first name, no matter how familiar the witness is to you. Do not address a medical doctor or expert witness holding a Ph.D. in a manner other than "Dr." Stand when questioning a witness.

4. Addressing opposing counsel. Do not address opposing counsel during a trial. All remarks should be directed to the court.

5. No narrative objections. State only "Objection" followed by the basis. Unless the court requests it, objections will not be argued.

6. Questioning by lawyers during voir dire. I allow the lawyers to question the prospective jurors in voir dire. If you have any sensitive questions you would prefer I ask, submit them at the *in limine* conference.

7. Exhibit notebooks. I appreciate a notebook with exhibits, and encourage the parties' use of exhibit notebooks for jurors. Ideally, the notebooks should be jointly prepared. However, if one party objects to the use of exhibit notebooks, the court will allow the proponent to put together its own notebooks, so long as all exhibits in the book have been admitted. I will become involved in this process only if there is a question as to admissibility of a particular exhibit. They should be prepared to allow easy reference by jurors, whether the pages are Bates-stamped or individual exhibits are individually numbered. The exhibit books are not to be removed from the courtroom without my permission. Be certain there is a notebook kept at the witness stand, and that copies are available for the court and law clerk.

8. Juror note-taking. I generally allow juror note-taking.

9. Approaching the witnesses with a document, deposition, or exhibit. You need not ask permission to approach the witness to hand the witness a document or to assist the witness in some manner.

10. Using the courtroom. The courtroom is yours to use as you see fit. Unless you attempt to either harass or intimidate a witness by moving up to the witness stand, you are not chained to the podium. Just be certain the court reporter, the jury, the witness, opposing counsel, and I can see and hear you and the witness at all times.

11. Bench conferences. Keep them to a minimum.

12. Making a record. Records will be made during a recess or at the end of the day.

13. Audio/visual equipment. If you will be using equipment, set it up and test it ahead of time. Various kinds of audio-visual equipment are available in the courtroom for your use. For instruction in its use, please contact the clerk's office.

14. Be time conscious. Be on time for all court sessions. At the beginning of the day and after a recess, have your witness in the courtroom and ready to take the stand. Have all of the exhibits you plan to use with the witness ready when each session of court begins.

15. Fill the trial day. Have enough witnesses available to fill the trial day. It is preferable to inconvenience one or two witnesses by having them come back the following day, rather than to send an entire jury home early due to lack of witnesses.

16. Limitations on numbers of witnesses. No more than three witnesses per side to testify to any given fact. No more than two experts per side to testify on any given point.

17. End of the day conference. At the end of each trial day, counsel and the court will discuss witnesses to be called, exhibits to be identified or offered and issues which may arise during the next trial day. The purpose is to address and resolve as many potential problems as possible without imposing on jury time.

18. Instructing the jury. I instruct the jury before closing argument so counsel can argue from the instructions.

If you have any questions, please contact us at the email address shown above. Thank you in advance for your cooperation in working toward a prompt and fair resolution of your case.